



Wisconsin State Senator

PAM GALLOWAY

Senate District 29

**Testimony on Special Session Senate Bill 22
Senate Committee on Judiciary, Utilities, Commerce, and
Government Operations
October 26, 2011**

Chairman Zipperer and members of the committee, thank you for taking the time to hear Special Session Senate Bill 22 today.

In Wisconsin, the Supreme Court has held that, generally, land possessors in Wisconsin owe no duty of care to trespassers. There are certain exceptions to this rule, including an exception where the damage to the trespasser was done intentionally by the land possessor. Exceptions also exist for child trespassers under certain circumstances. This general rule that Wisconsin follows is along the lines of the Second Restatement of Torts, and influential treatise summarizing common law in the United States, published by the American Law Institute.

The problem is that The Third Restatement of Torts takes an opposite approach to standard common law duty of care to trespassers. Under the Third Restatement, a land possessor would have a duty of care to exercise reasonable care for all entrants, including unwanted trespassers.

Special Session Senate Bill 22 codifies current law and would provide that a landowner generally has no duty of care to a trespasser, with limited exceptions which are listed in the bill. To not codify these laws could allow for unreasonable court rulings, which will drive up the costs for land and business owners. Giving trespassers new rights to sue is bad public policy, and will have a dramatic impact on land owners, especially those in rural and residential areas. To subject landowners to broad, new liability and costly lawsuits is unjust.

I want to thank all of you for your time and consideration. My thanks again to the Chairman for holding this hearing. I am happy to take any questions you might have.



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MEMORANDUM

To: Members, Senate Committee on Judiciary, Utilities, Commerce, and Government Operations

From: Andrew Cook, on behalf of Wisconsin Civil Justice Council

Date: Wednesday, October 26, 2011

Re: **Special Session AB 22/SB 22 – Trespasser Liability**

Wisconsin has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Like most other states, Wisconsin provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances.

Special Session AB 22/SB 22 simply puts into statutes these traditional common law rules. This legislation preempts courts from adopting a liberal provision in the new *Restatement Third of Torts: Liability for Physical and Emotional Harm* that would dramatically expand trespassers' rights to sue landowners and impose costly burdens on property owners, potentially leading to higher homeowner insurance premiums. Giving trespassers new rights to sue is bad public policy.

Current Wisconsin Law Pertaining to Trespasser Liability

Wisconsin's current trespasser liability law is based on case law, and therefore is not written in the statutes. Wisconsin courts distinguish between trespassers and non-trespassers in deciding liability when a person suffers an injury on the premises. A trespasser is a "person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."ⁱ

Like most other states, Wisconsin courts currently follow what is known as the *Restatement (Second) of Torts*, which provides that if the person is a trespasser the landowner only has a duty to refrain from willful and intentional injury.ⁱⁱ

As a general rule, a landowner is *not* liable for injury to trespassers caused by his or her failure to exercise "reasonable care" to put the land in safe condition for the trespasser. Nor is a landowner required to refrain from operations or activities that might cause injury until the trespasser is discovered. However, landowners do have a duty to warn known trespassers of highly dangerous conditions.

The Need to Codify Existing Wisconsin Trespasser Liability Law

Wisconsin's current case law has been in place for a very long time and continues to be fair, workable, and predictable.

However, the newly rewritten Restatement of Torts reverses the traditional rule as it relates to trespassers. The new *Restatement of the Law Third Torts: Liability for Physical and Emotional Harm* (§51) **imposes on landowners a duty to**

exercise reasonable care to all entrants, including unwanted trespassers.

The only exception to this new broad duty would be harm to “flagrant trespassers”—a concept that is not defined.

The new “flagrant trespasser” concept would undoubtedly generate substantial litigation over its meaning. Ultimately, if Wisconsin courts were to adopt the new Restatement Third of Torts, this exception could be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars.

If adopted by the courts, the new landowner liability provision in the Restatement Third of Torts could subject landowners to greater liability and increase insurance premiums. The new rules would also impose undue burdens on landowners, forcing them to take precautionary measures to deter trespassers from coming onto their land and protecting them from injury when they are unlawfully on the property.

What the Trespasser Liability Act (Special Session AB 22/SB 22) Accomplishes

In order to keep existing Wisconsin trespasser liability law in place and to preempt the courts from adopting the new Restatement Third of Torts, Special Session AB 22/SB 22 codifies the current case law as it exists today. The proposed legislation does the following:

- Follows Wisconsin’s longstanding rule that a possessor of real property owes no duty of care to a trespasser except to refrain from willfully, wantonly, or recklessly injuring the trespasser.
- A possessor of real property may be liable for harm to a child trespasser caused by a dangerous artificial condition on the land that the child was too young to appreciate but was known to the possessor. This exception is referred to as the attractive nuisance doctrine and has been part of Wisconsin case law since at least the 1930s.
- Clarifies that the legislation does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of the statutes or available at common law to which a possessor of real property may be entitled under circumstances not covered by the legislation.

Conclusion

Special Session AB 22/SB 22 simply codifies current case law and protects landowners from potential liability due to injury to trespassers.

ⁱ *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 843, 236 N.W.2d 1 (1975) (adopting the *Restatement (Second) of Torts* 2d § 239 (1965) (definition of trespasser)).

ⁱⁱ *Szafrański v. Radetzky*, 31 Wis. 2d 110, 125-26, 141 N.W.2d 902 (1966).



WISCONSIN'S BUSINESS VOICE SINCE 1911

TO: Members of the Senate Committee on Judiciary, Utilities, Commerce, and Government Operations

FROM: Jason Culotta, Director of Civil Justice Policy

DATE: October 26, 2011

RE: September 2011 Special Session Senate Bill 22 – Trespasser Liability

Current Trespasser Liability Law

Under both case law and current state statute in Wisconsin, a property owner does not have a duty of care to a trespasser injured on the property through no fault of the property owner.

The *Restatement Third, Torts*, published by the American Law Institute, characterizes trends in tort law across the country. The *Restatement Third*, reflecting trends in other parts of the country, states that landowners do have a duty of care to trespassers injured on the owner's property.

Provisions of September 2011 SS AB 22

September 2011 Special Session Assembly Bill 22 would pre-empt the application of trespasser liability provisions of the *Restatement Third* and maintains current state law.

The bill establishes the definition of a trespasser in state statute and outlines the appropriate liability to the property owner for intentionally harming a trespasser for reasons other than defense of the owner or another. The bill also creates a liability provision for injuries to children.

WMC Position

The Legislature should adopt this legislation before a duty of care to trespassers is cited by a state judge under the *Restatement Third*.

Property owners should have no responsibility for the actions of people who are not invited to be on the property.

The creation of this additional exposure to liability should be avoided. Adopting this legislation will serve that aim and preserve current state law.

Conclusion

For these reasons, WMC urges the Committee to support this legislation.

